



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

v.

[REDACTED], Respondent

DECISION

FOF/171862

PRELIMINARY RECITALS

Pursuant to a petition filed February 04, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on June 14, 2016, at Milwaukee, Wisconsin.

This hearing was originally scheduled to take place on March 22, 2016. The Respondent requested an adjournment, because she a scheduling conflict.

The hearing was rescheduled to April 12, 2016. The Respondent requested another adjournment, because she was still seeking the assistance of counsel.

The hearing was then rescheduled to May 24, 2016. The Respondent's attorney asked to reschedule the hearing, because the Petitioner had just given birth.

The matter was rescheduled to June 14, 2016.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV), by attempting to traffic her benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], Trafficking Agent
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County
2. On September 17, 2015, the Respondent created a Craig's List post that stated the Respondent was, "looking for a roommate as soon as possible. I can pay \$200 monthly with the addition to [sic] \$194 in stamps, I also cook and clean..." (Exhibit 5; testimony of Respondent)
3. On November 18, 2015, the Respondent provided a statement to OIG, indicating, "I was not selling or violating in anyway with my stamps. I fell in a rough spot & I was looking for a place to stay & I was stating that I can give \$200.00 in cash and I receive \$198 in stamps to contribute to the household also cook and clean. So I hope this give clarity to what I was saying." (Exhibit 7; testimony of Respondent)
4. On February 12, 2016, OIG prepared an Administrative Disqualification Hearing Notice alleging that the Petitioner attempted to traffic her FoodShare benefits on Craig's list on September 17, 2016. (Exhibit 1)

DISCUSSION

What is an Intentional Program Violation?

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

What is OIG's Burden of Proof?

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6).

In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the attempted trafficking occurred.

The Merits of OIG's case

This case deals with an allegation of attempted trafficking. Under 7 CFR §271.2, trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.¹ The previous definition of trafficking did not include attempted trafficking.

More specifically, OIG alleges that the Respondent attempted to traffic FoodShare benefits, based upon a September 17, 2015 Craig's List posting that stated the Respondent was, "looking for a roommate as soon as possible. I can pay \$200 monthly with the addition to \$194 in stamps, I also cook and clean..." (Exhibit 5)

OIG argues that the post shows the Petitioner's intent to trade her FoodShare benefits for shelter. However, the post is ambiguous.

The Respondent provided a statement to OIG and she testified that she had no intention of trading her FoodShare benefits for a place to live, or using her FoodShare benefits in lieu of rent. The Respondent testified that it was her intent to purchase and prepare meals/share food with her roommate. OIG has provided no evidence to refute the Respondent's claim.

General household definition. (a) A household is composed of one of the following individuals or groups of individuals, unless otherwise specified in paragraph (b) of this section:

1. An individual living alone;
2. An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or
3. **A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.**

Emphasis Added; 7 C.F.R. §273.1(a)

Showing intent to add one's roommate to one's FoodShare household is not the same as trying to traffic one's benefits by trading food stamps for shelter. There are no FoodShare regulations against adding one's roommate to one's food unit / household. The only caveat would be that the Respondent would have been obligated to report the new roommate and his/her income as part of her food unit / household,

¹ <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations>

if her income went over the 130% of FPL reporting limit. See 7 C.F.R. § 273.12(a)(vii); *FoodShare Wisconsin Handbook*, §6.1.1.2.

Based upon the foregoing, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent attempted to traffic her FoodShare benefits.

I note that even if the post could be interpreted as an expression of an intent to trade benefits for shelter, there is no good evidence of an overt act in furtherance of the intent to traffic.

The Federal Registrar addressing the amendment to the trafficking definition indicates that “attempt” consists of the “intent to do an act, an overt action beyond mere preparation, and the failure to complete the act.” Fed. Register Vol. 79, No. 162, pg. 51655²

The Federal Courts have dealt with establishing standards for determining when one has attempted to violate the law, as follows:

“As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct...Not only does the word ‘attempt’ as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements.” U.S. v. Resendiz-Ponce, 549 U.S.102, 127 S.Ct. 782, 107 (2007)

The Seventh Circuit Court of Appeals³ in U.S. v. Sanchez, 615 F.3d 836, 843 and 844 (7th Cir. 2010) followed this standard, stating that one must not only show an intent to violate the law, but also that the defendant took a substantial step toward completing the crime. The Court of Appeals further stated that, “a substantial step is ‘some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime’....and that it is ‘something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime’...The line between mere preparation is inherently fact specific; conduct that would appear to mere preparation in one case might qualify as a substantial step in another.”⁴

OIG argues that a person has to go through so many steps to create a post on Craig’s List, that the act of posting an ad is an overt act in furtherance of the intent to traffic, rather than a mere testing of the water. However, it is difficult to conclude that a single, ambiguous Craig’s List post is clear and convincing evidence of both an intent to trade/sell food stamps and an overt act beyond mere preparation to commit the offense.

Based upon the record before me, I find that that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV by attempting to traffic her benefits.

² See <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations#h-13>

³ Wisconsin is in the 7th Federal Judicial Circuit and as such, holdings from the 7th Circuit Court of Appeals are binding.

⁴ The Court of Appeals cited to *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980), *United States v. Rovetuso*, 768 F.2d 809, 821 (7th Cir.1985), *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir.2000) and *United States v. Magana*, 118 F.3d 1173, 1199 (7th Cir.1997).

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the FoodShare program rules by attempting to traffic FoodShare benefits online.

THEREFORE, it is

ORDERED

That IPV case number [REDACTED] is hereby reversed and that OIG cease enforcement efforts.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

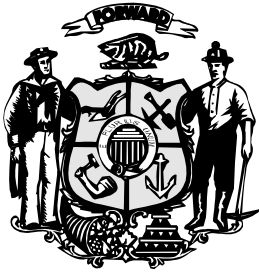
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 24th day of June, 2016.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 24, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability

[REDACTED]

[REDACTED]@wisconsin.gov